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No. 91-561

Supreme Court, U.S.

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In the
Supreme Court of the United States

October Term, 1991

MAHINDER S. UBEROI,
Petitioner,
v.

UNIVERSITY OF COLORADO, a State
Institution, WILLIAM McINERNY, JOE ROY,
GARY ARAI, JOHN HOLLOWAY,
and RICHARD THARP,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF COLORADO

PETITIONER'S SUPPLEMENTAL BRIEF

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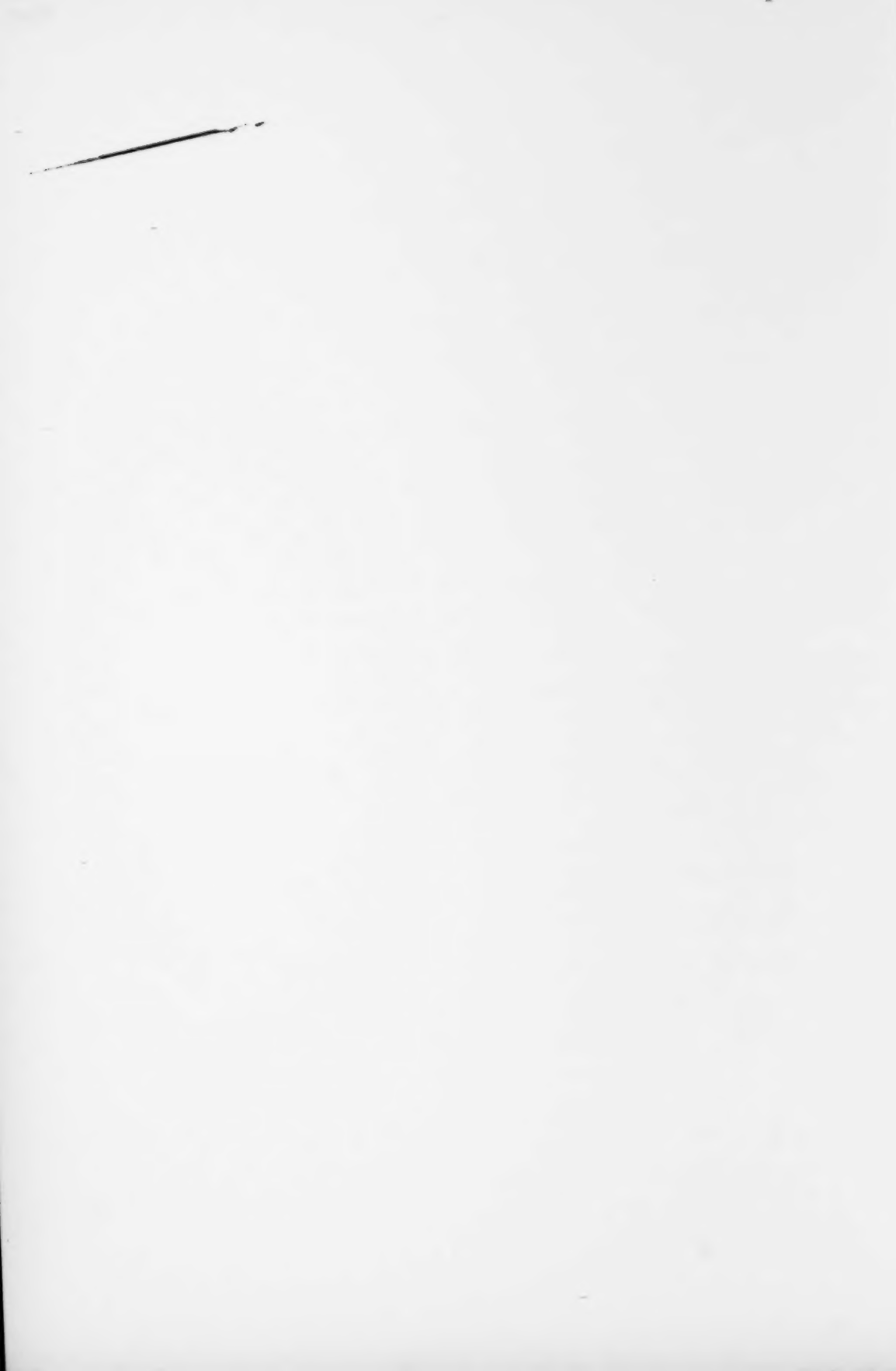
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Hafer v. Melo, No. 90-681 decided
by this Court on November 5, 1991, is
crucial to petitioner's case. The slip
opinion in Hafer at 11 states:

Summarizing our holding [in Will v. Michigan Department of State Police, 491 U.S. 58 (1989)], we said: "Neither a State nor its officials acting in their official capacities are 'persons' under §1983." Ibid. Hafer relies on this recapitulation for the proposition that she may not be held personally liable under §1983 for discharging respondents because she "acted" in her official capacity as Auditor General of Pennsylvania. Of course, the claims considered in Will were official-capacity claims; the phrase "acting in their official capacities" is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury. To the extent that Will allows the construction Hafer suggests, however, we now eliminate that ambiguity.

Relying on this ambiguity, Colorado Court of Appeals erroneously affirmed summary judgment for respondents on personal-capacity 42 U.S.C. §1983 claims. Petition at a3, a4.

Petitioner brought §1983 claims against University of Colorado, its officials and police officers. State district court dismissed claims against all respondents for lack of subject matter jurisdiction because the University is not a "person" under §1983. The dismissal of personal-capacity §1983 claims against individual respondents was clearly erroneous since these claims are not affected by the University's status under §1983.

Colorado Supreme Court in Uberoi v. University of Colorado, 713 P.2d 894 (Colo. 1986) held that the University is sufficiently independent of the state to be considered a local governing body and therefore a "person" under §1983, following Monell v. Department of Social

Services of City of New York, 436 U.S.

658 (1978). It reinstated §1983 claims against the University and all individual respondents.

Having determined that the University is a "person" under §1983, it was not necessary for the court to state that personal-capacity suits against individual respondents would be reinstated, regardless of the University's status under §1983.

On remand, trial court granted summary judgment for all respondents because their conduct did not rise to the level of constitutional deprivations. Colorado Court of Appeals ruled that:

While this appeal was pending the United States Supreme Court ruled, in Will v. Michigan Department of

State Police, 491 U.S. 58 (1989), that states, governmental entities that are "arms of the state" and state officials acting in their official capacity are not "persons" within the meaning of 42 U.S.C. §1983. [Emphasis added, petition at a3.]

Accordingly, although the trial court provided different reasons for its second dismissal of the complaint, we affirm the dismissal on the ground that it lacked subject matter jurisdiction. [Petition at a4.]

As far as the dismissal of personal-capacity §1983 claims against respondents is concerned, Colorado Court of Appeals' affirmance based on Will is clearly erroneous in view of this court's holding in the last paragraph of Hafer:

We hold that state officials, sued in their individual capacities, are "persons" within the meaning of §1983. The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from

personal liability under §1983
solely by virtue of the "official"
nature of their acts.

CONCLUSION

For this additional and crucial
reason of the holding in Hafer, the
petition should be granted.

Respectfully submitted,

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